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Self-Incrimination--Fifth Amendment: Grand Juries--Use Immunity: Kastigar v. United States, 406 U.S. 441 (1972)

was convinced of guilt.[60] Majorities of less than three-fourths could be called into question in the future.[61]

[60] 406 U.S. at 362.

[61] Montana permits jury verdicts of ⅔ in nonfelony cases. MONT. CONST. art. III, §23. The federal Constitution incorporates majorities of ¾ for ratification of Constitutional amendments, U.S. CONST. art. V, and ⅔ for ratification of treaties, *id.* art. II, §2, impeachment, *id.* art. I, §3, and declaration of presidential disability, *id.* amend. XXV, §4, as substantial majorities. Thus it is not unlikely that the Montana provision would be sustained.

FIFTH AMENDMENT—SELF-INCRIMINATION

Grand Juries—Use Immunity:

Kastigar v. United States, 406 U.S. 441 (1972)

In *Kastigar v. United States*[1] the Supreme Court held that use immunity[2] is constitutionally sufficient to compel an unwilling witness to testify over a claim of the fifth amendment privilege against self-incrimination and that transactional immunity[3] is not required. Petitioners in *Kastigar* were held in contempt[4] for refusing to answer questions before a federal grand jury after they had been granted use immunity.[5] In the contempt proceeding and before the Supreme Court, the petitioners contended that use immunity was not coextensive with the privilege against self-incrimination and, therefore, was unconstitutional.[6]

In affirming the lower courts, the Supreme Court recognized the long-settled principle that a grant of immunity must be coextensive with the privilege against self-incrimination which it supplants.[7] In holding that use immunity satisfies this requirement, the Court stated:

> The privilege has never been construed to mean that one who invokes it cannot subsequently be prosecuted. Its sole concern is to afford protection against being "forced to give testimony leading to the infliction of penalties affixed to . . . criminal acts." Immunity from the use of compelled testimony and evidence derived directly and indirectly therefrom affords this protection.[8]

The majority expressly disavowed the dictum in *Counselman v. Hitchcock*[9] which stated that an immunity statute must provide absolute immunity against future prosecutions concerning matters about which the witness had testified.[10] In dissent, Justices Douglas and Marshall argued that *Counselman* should be followed and that a grant of absolute immunity is constitutionally required to compel testimony over a claim of the fifth amendment privilege.[11] Justice Marshall also argued that the safeguards against prosecutorial use of com-

[1] 406 U.S. 441 (1972).

[2] "Use" immunity merely prohibits prosecutorial use and derivative use of compelled testimony; the witness, however, may be prosecuted for a crime to which the compelled testimony relates if the evidence used against him is acquired from a source independent of the compelled testimony. Kastigar v. United States, 406 U.S. at 453 (1972).

[3] "Transactional" immunity provides complete immunity from future prosecution for any crime to which the witness' testimony relates. Counselman v. Hitchcock, 142 U.S. 547 (1892).

[4] The contempt order was issued pursuant to 28 U.S.C. §1826 (1970). Under similar circumstances, the seventh circuit reversed a contempt citation, reasoning that Counselman v. Hitchcock, 142 U.S. 547 (1892), required a grant of "transactional immunity." *In re* Korman, 449 F.2d 32 (7th Cir. 1971), *rev'd sub nom.* United States v. Korman, 406 U.S 952 (1972).

[5] Immunity was granted pursuant to 18 U.S.C. §6002 (1970), which states:

> Whenever a witness refuses on the basis of his privilege against self-incrimination to testify or provide other information in a proceeding before or ancillary to
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> 1) a court or grand jury of the United States,
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> 2) an agency of the U.S., or
>
> 3) either House or Congress . . . the person presiding over the proceeding communicates to the witness an order issued under this part, the witness may not refuse to comply with the order on the basis of his privilege of self-incrimination; but no testimony or other information compelled under the order (or any information directly or indirectly derived from such testimony or other information) may be used against the witness in any criminal case, except a prosecution for perjury, giving a false statement, or otherwise failing to comply with the order.

[6] The petitioner contended that only transactional immunity was coextensive with the fifth amendment privilege and, therefore, was the only constitutionally permissible grant of immunity.

[7] The coextensive standard was first formulated in Counselman v. Hitchcock, 142 U.S. 547 (1892).

[8] 406 U.S. at 453 (footnotes omitted).

[9] 142 U.S. 547 (1892).

[10] *Id.* at 585–86. *See* text accompanying note 20 *infra.*

[11] 406 U.S. at 467, 471.

pelled testimony described in the majority opinion were illusory.[12]

Kastigar comes in the wake of a long line of cases extending the scope of the fifth amendment privilege and the requisite amount of immunity required to supplant it. The Supreme Court's initial confrontation with the problems raised by a witness who refuses to testify despite a statutory grant of immunity was in *Counselman v. Hitchcock*.[13] In that case, Counselman was adjudged in contempt[14] for refusing to answer grand jury questions after he had been granted immunity.[15] On appeal, the Supreme Court held that Counselman's refusal to testify was proper because the immunity granted was not coextensive with the scope of the privilege against self-incrimination which the grant purportedly supplanted.[16]

The statute in *Counselman* provided that no "evidence obtained from a party or witness by means of judicial proceeding . . . shall be given in evidence, or in any manner used against him . . . in any court of the United States. . . ." [17] The Court construed the statute as affording a witness protection only against the use of the specific testimony compelled and not from the derivative use thereof.[18] Although the Court found the statute unconstitutional because it was not coextensive with the privilege by virtue of its failure to provide derivative use immunity, it also stated the following in dictum:

> [N]o statute which leaves the party or witness subject to prosecution after he answers the criminating questions put to him, can have the effect of supplanting the privilege conferred by the Constitution of the United States. . . . [A] statutory enactment, to be valid must afford absolute immunity against future prosecution for the offense to which the question relates.[19]

Following the *Counselman* decision, Congress enacted the Compulsory Testimony Act of 1893.[20] In an effort to meet the "coextensive" requirement of *Counselman*, Congress included in the statute the Court's advisory language that "absolute immunity against future prosecution" is constitutionally mandated. The Act therefore provided: "[N]o person shall be prosecuted . . . for or on account of any transaction, matter or thing, concerning which he may testify. . . ." [21]

The 1893 Act became the model for all later federal immunity legislation.[22] Mr. Justice Frankfurter noted in *Ullmann v. United States*[23] that transactional immunity had become part of the nation's constitutional fabric.[24] Prior to *Kastigar*, transactional immunity seemingly had become imbedded in American federal jurisprudence.

In 1964, however, the Supreme Court rendered two decisions concerning state immunity grants which seemed to alter the extent of immunity needed to satisfy *Counselman's* "coextensive" requirement. In *Malloy v. Hogan*,[25] the Court held that the fifth amendment privilege against self-incrimination was applicable to the states through the fourteenth amendment. This decision overruled *Twining v. New Jersey*,[26] which held that the fifth amendment privilege did not apply to the states. Under *Twining*, any protection afforded an individual by a state through a grant of immunity was gratuitous on the part of the state rather than required under the federal constitution. After *Malloy* the "coextensive" requirement of *Counselman* was determinative of the constitutionality of state immunity statutes.[27]

In *Murphy v. Waterfront Commission*,[28] the second case, the Court rejected the doctrine that a state grant of immunity did not extend protection beyond the borders of the immunizing state. Prior to *Murphy* a state grant did not prevent subse-

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[12] *Id.* at 468–69.

[13] 142 U.S. 547 (1892).

[14] *In re* Counselman, 44 F. 268 (7th Cir. 1890).

[15] Immunity was provided under the Act of February 25, 1868, ch. 13, 15 Stat. 37.

[16] 142 U.S. 547, 585 (1892).

[17] Act of February 25, 1868, ch. 13, 15 Stat. 37.

[18] 142 U.S. at 564. The Court found that under this construction, the statute:

> could not and would not, prevent the use of his testimony to search out other testimony to be used in evidence against him or his property, in a criminal proceeding in such court. It could not prevent the obtaining and the use of witnesses and evidence which should be attributable directly to the testimony he might give under compulsion, and on which he might be convicted, when otherwise, and if he had refused to answer, he could not possibly have been convicted.

[19] *Id.* at 585–86.

[20] Act of February 11, 1893, ch. 83, 27 Stat. 443. This statute was repealed by the Organized Crime Control Act of 1970, Pub. L. No. 91–452, §245, 84 Stat. 922, 931 (codified in scattered titles and sections of U.S.C.).

[21] Act of February 11, 1893, ch. 83, 27 Stat. 443.

[22] *See, e.g.*, NATIONAL COMMISSION ON REFORM OF FEDERAL CRIMINAL LAWS, WORKING PAPERS 1444–45 (1970).

[23] 350 U.S. 422 (1956).

[24] *Id.* at 438.

[25] 378 U.S. 1 (1964).

[26] 211 U.S. 78 (1908).

[27] In Zicarelli v. New Jersey State Commission of Investigation, 406 U.S. 472 (1972), the Court held that the coextensive formula of *Counselman* is satisfied by state statutory immunity from use and derivative use.

[28] 378 U.S. 52 (1964).

quent prosecution by the federal government[29] or by sister states.[30] This result followed because states, lacking a grant of power comparable to the supremacy clause,[31] are unable to give their immunity statutes extrajurisdictional effect.

In *Murphy*, petitioners refused to testify on the ground that their answers might tend to incriminate them under federal laws to which the immunity granted them by the states did not purport to extend.[32] They were adjudged in contempt.[33] On appeal to the Supreme Court, the issue was whether one jurisdiction within the federal structure may compel a witness, whom it has immunized from prosecution under its laws, to give testimony which might then be used by another jurisdiction not bound by the immunity grant.[34]

After considering the federal precedents supporting the "two sovereign rule" that testimony may be compelled by one jurisdiction and used by another,[35] and finding that "there is no continuing legal vitality to, or historical justification for the rule," [36] Justice Goldberg, speaking for the Court, concluded that the constitutional privilege against self-incrimination protects a state witness against incrimination under federal as well as state law and a federal witness against incrimination under state as well as federal law." [37] To provide this protection, the Court proscribed the federal government from using the state-compelled testimony and its fruits.[38] The Court found that this exclusionary rule permits states to secure information necessary for effective law enforcement yet "leaves the witness and the Federal Government in substantially the same position as if the witness had claimed his privilege in the absence of a state grant of immunity." [39]

While the Court in *Murphy* reaffirmed the constitutional requirement of coextensiveness announced in *Counselman*, it did not hold that an immunized state witness must be immune from federal prosecution.[40] Justice Goldberg ignored those statements in *Counselman* that transactional immunity is required, and read that case to mean that immunity statutes must protect a witness from the derivative use of his compelled testimony.[41]

The Court in *Kastigar v. United States*, consistent with what it felt was the reasoning and result of *Murphy*, established in sweeping terms that use immunity is coterminous with the fifth amendment privilege and sufficient to replace it.[42] In dissent, Justice Douglas argued that *Murphy* did not restrict the *Counselman* requirement of transactional immunity. Rather, he regarded the *Murphy* decision as an attempt to deal with the problems created by federalism.[43] He felt that since *Murphy* did not expressly overrule *Counselman*, the *Counselman* formula for coextensiveness remained valid in intrajurisdictional (single sovereign) settings, while the *Murphy* formula applies to interjurisdictional (dual sovereign) situations.

Justice Douglas' reasoning was based on the belief that the threat of future prosecution is substantial when a single sovereign can first compel incriminating testimony and later bring prosecution, whereas when the jurisdiction bringing the prosecution differs from the jurisdiction that compelled the testimony, the threat of prosecution may fade.[44] This argument, however, ignores the exist-

[29] *See, e.g.*, Knapp v. Schweitzer, 357 U.S. 371 (1958) which held that state grants of immunity did not reach the federal government. *See also* Feldman v. United States, 322 U.S. 487 (1944), holding that federal courts could admit evidence that had been compelled under a state grant of immunity.

[30] The state courts are split as to the effect of immunization under the laws of another state. McCORMICK, EVIDENCE §124 (1954).

[31] By virtue of the supremacy clause, U.S. CONST. art. VI, §2, federal statutes prevail over any contravening state law. Therefore, under a federal grant of immunity a witness is protected against subsequent prosecution by both federal and state authorities. Brown v. Walker, 161 U.S. 591 (1896). *See generally* Reina v. United States, 364 U.S. 507 (1960); Ullman v. United States, 350 U.S. 422 (1956); Adams v. Maryland, 347 U.S. 179 (1954).

[32] *See* notes 29–31 and accompanying text *supra*.

[33] Application of Waterfront Commission, 39 N.J. 436, 452–58, 189 A.2d 36, 46–49 (1963).

[34] 378 U.S. 52, 54 (1964).

[35] *See* note 29 *supra*. *See also* United States v. Murdock, 284 U.S. 141 (1931); Jack v. Kansas, 199 U.S. 372 (1905).

[36] 378 U.S. 52, 77 (1964).

[37] *Id.* at 77–78. *See generally*, Hofstadler & Levittan, *Immunity and the Privilege Against Self-Incrimination—Too Little and Too Much*, 39 N.Y.S.B.J. 105 (1967).

[38] 378 U.S. at 79.

[39] *Id.* Although none of the opinions in *Murphy* directly considered the problem of a non-immunizing state bringing prosecution subsequent to a grant of immunity by a sister state, the majority opinion did state that the Court was abandoning "the rule that one jurisdiction within our federal structure may compel a witness to give testimony which could be used to convict him of a crime in another jurisdiction." *Id.* at 77. If this exclusionary rule is constitutional in origin, then it should apply to state as well as federal courts.

[40] Of course, the *Murphy* Court was not faced with the issue of transactional immunity. The petitioner in that case did not contend that a state's grant of immunity should simultaneously grant federal transactional immunity. Rather, the contention was that states cannot grant immunity.

[41] 378 U.S. at 78, quoting Counselman v. Hitchcock, 142 U.S. 547, 564 (1892).

[42] 406 U.S. at 458, citing Murphy v. Waterfront Commission, 378 U.S. 52 (1964).

[43] 406 U.S. at 463–64.

[44] *Id.* at 464.

ence of cooperation between state and federal authorities in conducting criminal investigations.

Additionally, immunity legislation need only be functionally equivalent to the fifth amendment privilege which it replaces. As the majority opinion notes, the *Murphy* conclusion that prohibition of use and derivative use "leaves the witness and the Federal Government in substantially the same position as if the witness had not testified" [45] demonstrates that Court's belief that use immunity and the fifth amendment are coextensive. If the exclusionary rule enunciated in *Murphy* is constitutionally sufficient in a dual sovereign setting, then there is no constitutional reason for retaining, in any context, the stricter standard of *Counselman*.[46] An argument that a dual sovereign situation presents different considerations than a single sovereign setting is not based upon constitutional consideration but rather upon administrative expediencies. It confuses the need for administrative restraint with the constitutional scope of the privilege.

Mr. Justice Douglas also argued that in *Albertson v. Subversive Activities Control Board*,[47] a single sovereign situation, the Court, in striking down an immunity statute, cited *Counselman*[48] while *Murphy* was not mentioned. While it is true that the Court in *Albertson* did cite *Counselman* language, as the *Kastigar* majority notes[49] the immunity statute involved was held insufficient because it did not preclude *"any use of the information called for . . . either as evidence or as an investigating lead."* [50] This is the standard set forth in *Murphy*.

The Court next addressed petitioners' contention that the exclusionary rule will prove impossible to enforce. Petitioners contended, and Justice Marshall agreed in dissent, that a witness would have to depend on the integrity and good faith of the prosecuting authorities for the information relevant to the question of taint.[51] The Court, quoting from *Murphy*, however, meets this objection by shifting the burden of proof on the issue of taint:

> "Once a defendant demonstrates that he has testified under a . . . grant of immunity . . . the authorities have the burden of showing that their evidence is not tainted by establishing that they had an independent, legitimate source for the disputed evidence." . . . This burden of proof . . . is not limited to a negation of taint; rather, it imposes on the prosecution the affirmative duty to prove that the evidence it proposes to use is derived from a legitimate source wholly independent of the compelled testimony.[52]

Although the burden of proof is thus shifted, the majority opinion is insufficient on this point in that it fails to establish the degree of proof required in order for the government to meet its burden. Mr. Justice Marshall fears that the government could meet this burden by mere assertion.[53] While the Court suggests that a higher degree of proof will be required,[54] it fails to enunciate what standard will apply.[55]

Finally, to further substantiate its holding that the fifth amendment does not require immunity legislation to provide transactional immunity but rather is satisfied by a witness' right to suppress tainted evidence and its fruits at trial, the Court compares statutory immunity with the "immunity" that is conferred by an unconstitutional interrogation.

> A coerced confession, as revealing of leads as testimony given in exchange for immunity, is inadmissible in a criminal case, but it does not bar prosecution.[56]

Mr. Justice Marshall found the analogy to be inappropriate in that immunity legislation operates in advance of the interrogation and gives it constitutional approval, whereas in the case of coerced confessions, the exclusionary rule merely provides a remedy to the victims of illegal police conduct. Notwithstanding the differences in these two situations, as outlined by Mr. Justice Marshall, the

[45] 378 U.S. 52, 79 (1964).

[46] Comment, *Witness Immunity Statutes: The Constitutional and Functional Sufficiency of "Use Immunity,"* 51 B.U.L. REV. 616, 632 (1971).

[47] 382 U.S. 70 (1965).

[48] *Id.* at 80.

[49] 406 U.S. at 455 n.39.

[50] Albertson v. Subversive Activities Control Board, 382 U.S. 70, 80 (1965) (emphasis added).

[51] 406 U.S. at 468–69.

[52] *Id.* at 460 (citations omitted), quoting Murphy v. Waterfront Commission, 378 U.S. 52, 79 n.18 (1964).

[53] 406 U.S. at 469.

[54] *Id.* at 460.

[55] One lower federal court has held that "clear and convincing" is the correct standard. United States v. Pappadio, 235 F. Supp. 887, 890 (S.D.N.Y. 1964). *See generally* Note, *In re Koota: The Scope of Immunity Statutes*, 61 NW. U. L. REV. 654 (1966); Note, *Self-Incrimination and the State: Restriking the Balance*, 73 YALE L. J. 1491 (1964).

[56] 406 U.S. at 461. The Court, *id* at n.53, quotes Mr. Justice White's concurring opinion in Murphy v. Waterfront Commission, 378 U.S. 52, 103 (1964): "A coerced confession is as revealing of leads as testimony given in exchange for immunity and indeed as excluded in part because it is compelled incrimination in violation of the privilege."